Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-1188

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL CLEMENTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the court of appeals erred in concluding that venue for the trial of his alleged tax offenses could properly be laid, over his objection, in the Southern District of New York, where the tax return was prepared, rather than in the Eastern District of New York, where petitioner resides. Petitioner claims that, because he mailed his tax return to IRS, he has an unconditional right under 18 U.S.C. 3237(b) to demand that the trial of his offenses be held in the district of his residence.[1] The court of appeals correctly rejected

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[1]The original indictment charged petitioner and ten others with "racketeering, extortion, labor pay-offs and tax evasion" (Pet. App. E-2). Petitioner sought to transfer only the tax counts against him to the Eastern District of New York (*id.* at E-3). Were he to succeed, the separate trial would entail considerable duplication of judicial and prosecutorial effort.

petitioner's contention in an opinion on which we essentially rely (Pet. App. E). The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals,[2] and further review is therefore not warranted.

18 U.S.C. 3237(a) provides generally that "any offense against the United States begun in one district and completed in another * * * may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." It is undisputed that, because petitioner's tax return was prepared in the Southern District of New York, the indictment in this case was properly filed in that district under 18 U.S.C. 3237(a). Under 18 U.S.C. 3237(b), however:

> [W]here an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of [the Internal Revenue Code] and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed * * *.

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[2]The decisions in *United States* v. *Tarnopol*, 561 F. 2d 466 (3d Cir. 1977), and *United States* v. *Slutsky*, 487 F. 2d 832 (2d Cir.), cert. denied, 416 U.S. 937 (1974), are not in conflict with the decision here. In *Tarnopol*, the court merely noted (561 F. 2d at 469) that seven tax evasion counts had been transferred to another district. Similarly, in *Slutsky*, the court of appeals merely made reference (487 F. 2d at 839 n.9) to the transfer provision of Section 3237(b). Neither case even remotely purports to construe the statutory language considered by the court of appeals here.

It is true, however, as petitioner notes (Pet. 6-10), that several district courts have interpreted 18 U.S.C. 3237(b) differently from the court of appeals in this case.

Petitioner's claim is that, because he mailed his tax return to IRS, his offense is "an offense involv[ing] use of the mails" within the intendment of Section 3237(b) and thus must be tried, at his election, in the district of his residence.

As the court of appeals concluded, however, petitioner's offense is not an offense that "involves use of the mails" within the meaning of 18 U.S.C. 3237(b) merely because he mailed his tax return to IRS. Section 3237(b) is simply an exception for tax offenses to the second paragraph of Section 3237(a), which allows venue to be laid, for "[a]ny offense involving the use of the mails," in "any district from, through, or into which such * * * mail matter moves." The evil that Congress sought to remedy in enacting Section 3237(b) "was the prosecution of a taxpayer at a great distance from his residence simply because his tax return had been mailed to an Internal Revenue Service office located in a district remote from the taxpayer's district of residence" (Pet. App. E-7, citing *Hearings on H.R. 8252 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 7, 10-12, 27 (1958)). As the court of appeals concluded, "[r]eading the statute to apply only when the prosecution uses a mailing to establish venue in a district other than the district of the defendant's residence fully meets the problem that concerned the Congress" (Pet. App. E-7).[3]

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[3]See *Stafford* v. *Briggs*, No. 77-1546 (Feb. 20, 1980), slip op. 7, quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194 (1857) ("it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute * * * and the object and policy of the law").

Thus, under this statute, when an indictment is laid in the district where the return has been received solely on the basis of a mailing, the defendant may obtain the transfer of his trial to the district of his residence because "the acts for which the defendant is really being tried * * * bear little or no relationship to the place where his tax return is received." H. R. Rep. No. 1890, 85th Cong., 2d Sess. 2 (1958); S. Rep. No. 1952, 85th Cong., 2d Sess. 2 (1958). Nothing in the legislative history, however, indicates that "Congress intended to give a taxpayer the option to be tried in his district of residence when [as here] it is his criminal conduct and not the use of the mails that the Government relies upon to establish venue elsewhere" (Pet. App. E-8). Because the indictment filed in this case does not rely on petitioner's use of the mails as the basis for venue in the Southern District of New York, petitioner is not entitled to a change of venue under 18 U.S.C. 3237(b).

Moreover, the decision of the court of appeals is interlocutory. If petitioner is convicted on the tax evasion counts at his trial, he may renew his objection to venue in a subsequent appeal and thereafter seek review of that claim together with any other objections to the final judgment, in this Court. If, on the other hand, petitioner is acquitted at his trial, his objection to venue will become moot.[4] It is therefore premature for the Court to consider the question that petitioner has presented in this petition.

[4]The burden on petitioner of attending trial in the Southern rather than the Eastern District of New York is negligible.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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